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No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN LEE HARRIS,

Petitioner,

v.

MARVIN REED, Warden,
and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENTS AND SUPPORTING AMICI FAIL TO ARTICULATE ANY SOUND REASON WHY THE PLAIN STATEMENT RULE OF *MICHIGAN* V. *LONG* SHOULD NOT APPLY TO HABEAS CASES.

When a federal court is forced to evaluate an ambiguous state court opinion, it is best able to maintain the principles of comity and consistency if it follows the plain statement rule articulated by the Court in *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). Neither Respondents nor *Amici* offer any sound reason why federal courts should not apply the plain statement rule to habeas cases as is already done in direct appeal cases. Indeed, the Brief of *Amicus Curiae* State of Florida completely ignores the *Long* decision as well as its progeny *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). Thus, Respondents and *Amici* avoid the key issue before the Court.

Avoiding the key issue, Respondents contend that application of the plain statement rule to habeas cases will "do illogical mischief to Illinois rules of waiver and default." (Respondents' Brief at 12). To avoid this alleged mischief, Respondents urge adoption of a presumption in favor of waiver and default. (*Id.*) A review of Illinois rules of waiver and default, however, reveals that Respondent's contention of "illogical mischief" is unfounded and that the presumption urged by Respondents would create its own mischief.

A. Respondents' Contention Of "Illogical Mischief" Is Unfounded.

Waiver rules are not rigidly enforced by Illinois courts in cases arising under the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* ch. 38, par. 122-1 *et seq.* (1987). The Act provides that any imprisoned person who asserts that his constitutional rights were denied in the trial that

resulted in his conviction may file a post-conviction petition seeking review of the constitutional issue. *Ill. Rev. Stat.* ch. 38, par. 122-1 (1987). The only statutory reference to waiver of claims appears in Paragraph 122-3 as follows: "Any claim or substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Ill. Rev. Stat.* ch. 38, par. 122-3 (1987).

Illinois courts have narrowed this broad right of post-conviction review somewhat by applying the common law doctrine of *res judicata*. As correctly noted by Respondents, the Illinois Supreme Court held in *People* v. *Gaines*, 105 Ill.2d 79, 87-88, 473 N.E.2d 868, 873 (1984), *cert. denied, sub nom. Gaines* v. *Illinois*, 471 U.S. 1131 (1985), that "where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived." Respondents neglect, however, to mention that the *Gaines* decision continued with the statement that "*[t]he strict application of the doctrine of res judicata may be relaxed, however, where fundamental fairness so requires.* [citations omitted]." *Id.* at 91, 473 N.E. 2d at 875 (emphasis added).

A review of Illinois cases shows that "fundamental fairness" frequently results in relaxation of *res judicata* principles-particularly when the issue involves the effectiveness of trial or appellate counsel. In *Gaines*, for example, the Illinois Supreme Court observed that the petitioner had not raised ineffective assistance of counsel as an issue in his direct appeal and that, ordinarily, the doctrine of *res judicata* would bar him from raising the issue in his post-conviction petition. "Fundamental fairness," however, compelled the court to relax its waiver

rule and address the merits of the petitioner's constitutional claim. *Id.* at 91-96, 473 N.E. 2d at 875-879.

Similarly, in *People* v. *Frank*, 48 Ill.2d 500, 503, 272 N.E.2d 25, 27 (1971), the Illinois Supreme Court held that the doctrine of *res judicata* would not bar the assertion of constitutional claims in a post-conviction petition when the alleged waiver stemmed from the inaction of incompetent appointed counsel. *See also People* v. *Martinez*, 104 Ill.App.3d 990, 991, 433 N.E.2d 981, 983 (1st Dist. 1982) (failure to raise ineffective assistance of counsel on direct appeal excused in post-conviction proceeding); *People* v. *Talley*, 97 Ill.App.3d 439, 442, 422 N.E.2d 1084, 1087 (1st Dist. 1981) ("the rule of waiver is not unyielding [in post-conviction proceedings)"; *People* v. *Cowherd*, 114 Ill.App.3d 894, 898, 449 N.E.2d 589, 591 (2d Dist. 1983) (fundamental fairness requires relaxation of doctrine of *res judicata*); *People* v. *Green*, 34 Ill.App.3d 153, 155. 340 N.E.2d 58, 60 (1st Dist. 1975) (fundamental fairness compelled review of ineffective assistance of counsel claim even though not raised on direct appeal); *People* v. *Ruiz*, 24 Ill.App.3d 449, 321 N.E.2d 746 (1st Dist. 1974) (fundamental fairness required review of issue even though not raised on direct appeal); *People* v. *Hayes*, 144 Ill.App.3d 696, 494 N.E.2d 1238 (2d Dist 1986) (appellate court reviewing denial of post-conviction petition will not apply *res judicata* as waiver to bar defendant from raising claim that his counsel's failure to raise Posse Comitatus Act issue at trial and on appeal constituted ineffective assistance of counsel); Wangerin, *"Plain Error" and "Fundamental Fairness": Toward A Definition of Exceptions to the Rules of Procedural Default*, 29 *De Paul L. Rev.* 753, 771 (1980) ("defects in counsel - either *pro se* appearances, incompetence, or improper conduct - serve as the basic tools for avoiding the *res judicata* effect of Illinois' inter-

pretation of its post-conviction relief statute"). Thus, Respondents' assertion that "[p]rocedural default rules are rigidly enforced by Illinois courts" is not true in the context of post-conviction proceedings involving claims of ineffective assistance of counsel.

Also untrue is Respondents' unsupported theory that "if the issue [the merits] is decided against the defendant, the appellate court, *in effect*, is holding that there is no plain error and, therefore, the waiver rule should not be relaxed." (Respondents' Brief at 18, emphasis added.) In many of the cases cited in the preceding paragraph of this brief, the appellate courts first relaxed the waiver rule and then decided against the petitioner on the merits. Relaxation of the waiver rule, contrary to Respondents' assertion, does not necessarily depend on the outcome of the appellate court's decision on the merits.

Furthermore, application of *Long's* plain statement rule in federal habeas cases will not do "illogical mischief" to Illinois' rules of waiver and default as Respondents claim. (Respondents' Brief at 12.) The plain statement rule will not preclude Illinois courts from invoking the doctrine of *res judicata* as a basis for denying review of constitutional claims in proceedings under the Illinois Post-Conviction Hearing Act. The rule requires only a plain statement of the basis for the court's judgment if the court intends to preclude federal review. Illinois courts have had no difficulty invoking the doctrine of *res judicata* as a basis for judgment in post-conviction proceedings, when that is their intent. *See e.g.*, *People* v. *Mitchell*, 163 Ill.App.3d 1007, 517 N.E.2d 20 (4th Dist. 1987); *People* v. *Buckolz*, 24 Ill.App.3d 324, 320 N.E.2d 421 (5th Dist. 1974); *People* v. *Johnson*, 16 Ill.App.3d 79, 305 N.E.2d 697 (1st Dist. 1973). Thus, the plain statement rule will impose no great additional burden on Illinois courts.

The plain statement rule is also acceptable to at least three of the *amici*. Indeed, the *Amici* Brief of the States of California, Mississippi, and North Carolina embraces the plain statement rule, cites *Caldwell* and *Long* with approval and states:

> As long as the state plainly relies on a procedural bar, regardless of whether it also alternatively determines the weakness of the merits, the state defendant should be procedurally barred from obtaining relief in federal habeas corpus proceedings.

(*Amici* Brief of California, *et al.* at p. 4.) These *amici* do not ask that the decision below be affirmed. They ask only that the Court not adopt the position of the Court of Appeals of the Ninth Circuit that allows habeas review whenever the state court relies alternatively on the twin grounds of procedural default and the merits. *See Bradford* v. *Stone*, 594 F.2d 1294, 1296, n.2 (9th Cir. 1979); *see also Brasier* v. *Douglas*, 815 F.2d 64, 65 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3271 (1987). In other words, the Ninth Circuit allows habeas review unless the state court relies exclusively on a procedural default—a position the Petitioner does not advocate here.

Petitioner also has no quarrel with the other red herring in this case, this one raised by Respondents, that federal courts should presume that "the state court has followed its law—not that it has ignored it." (Respondents' Brief at 8 and 12.) Respondents assert that they sharply disagree "with the suggestion that there should be a uniform presumption that the state courts have not followed state procedural rules." (*Id.* at 8.) Petitioner is not aware that anyone has made such a suggestion. Petitioner has only suggested application of the plain statement rule which, recognizing that state courts sometimes invoke waiver and sometimes excuse it in accordance with

state law, requires that they articulate what they are doing so that federal courts can properly respect an adequate and independent state ground for the judgment. Any presumption that state courts are following their law must take into account that state law in almost all jurisdictions allows for waiver of procedural default in some circumstances. In sum, application of *Long's* plain statement rule clearly will not interfere with procedural default rules in Illinois or any other state.

B. Respondents' Presumption In Favor Of Waiver Would Work Its Own Mischief.

Petitioner does quarrel with Respondents' proposed presumption in favor of waiver. Such a presumption would work its own mischief. Illinois courts regularly write decisions that, although they discuss both procedural defaults and the merits, are based on the merits. Illinois courts address and rely on the merits in those cases, despite the procedural default, when they determine that fundamental fairness or other reasons require that the default or waiver be excused. As stated in *Cooper* v. *Wainwright*, 807 F.2d 881, 886 (11th Cir. 1986), *reh'g denied*, 811 F.2d 612 (1987), *cert. denied sub nom., Dugger* v. *Cooper*, ___ U.S. ___, 107 S.Ct. 2183 (1987), "[w]hen a state court decides a constitutional question, even though it does not have to, it necessarily holds that the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case before it." Comity between state and federal courts, encouraged by the Court in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), is served by respecting the state court's determination that its procedural default rules do not require enforcement in a particular case. *See Cooper*, 807 F.2d at 886. Comity also is served by allowing state courts to reach the merits of federal constitutional claims if they choose to do so.

Respondents' presumption in favor of waiver and default in contrast, would undermine these comity considerations. Federal courts, instead of respecting a state court's decision to reach the merits notwithstanding a procedural default, would be compelled to treat the state court's decision on the merits as *dictum*. State courts would be reluctant to address, or even mention, procedural default issues for fear of having a decision on the merits misconstrued as *dictum*.

Respondents' presumption in favor of waiver also is incompatible with settled precedent that "courts indulge in every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1983). *See also Brewer* v. *Williams*, 430 U.S. 387, 440 (1977); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). In fact, in *Long*, the Court refused to adopt a presumption in favor of waiver that would result in outright dismissal of direct appeal cases. The Court stated:

> Finally, outright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily on federal grounds and where the *independence* of the alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate "where there is strong indication . . . that the federal constitution as [sic] judicially controlled the decision below." *[Minnesota* v.] *National Tea Co. supra*, 309 U.S., at 566, 60 S.Ct. 679.

463 U.S. at 1040. Respondents offer no reason why the Court, having rejected a presumption in favor of waiver and dismissal in direct appeals, should now adopt such a presumption in habeas cases.[1]

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[1] The *amicus*, State of Florida, also argues for a similar presumption, namely, that once a state court conviction has become "final,"

(footnote continued on next page)

The cases cited by Respondents in support of a presumption in favor of waiver are not persuasive. *Martinez v. Harris*, 675 F.2d 51, 54 (2d Cir. 1982), *cert. denied*, 459 U.S. 849 (1982), and *Raper* v. *Mintzes*, 706 F.2d 161 (6th Cir. 1983), were decided before *Michigan* v. *Long*. Respondent's third case, *Campbell* v. *Wainwright*, 738 F.2d 1573, *reh'g denied en banc*, 746 F.2d 815 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126 (1986), which simply follows *Martinez* and does not address *Long*, was decided before the Court applied the plain statement rule to procedural defaults in *Caldwell*.

Respondents also do not mention more recent decisions from the lower courts that flatly reject Respondents' position. In *Hardin* v. *Black*, 845 F.2d 953, 958-59 (11th Cir. 1988), for example, the court states:

> It is abundantly clear that the *Sykes*' procedural default rule does not preclude federal habeas review of a petitioner's constitutional claims if the state court declines to apply a procedural bar and adjudicates the federal claim on the merits . . . . In the event that the federal court cannot decide on which basis the state court relied to deny collateral relief - whether because the claims were foreclosed by procedural default or because they were considered to lack merit - the federal court must address the claim on the merits.

(footnote continued from previous page)
that is, direct appeals have become exhausted, it should not be subjected to habeas review unless the state "through unambiguous language" indicates that it does not rest on a procedural ground. The State of Florida nowhere refers to either *Long* or *Caldwell*. The obvious and illogical implication of its distinction between "non-final" cases on direct appeal and "final" cases in habeas proceedings is that while ambiguity cannot be tolerated in direct appeals, it may be tolerated in habeas cases.

See also Mann v. *Dugger*, 844 F.2d 1446, 1448, n. 4 (11th Cir. 1988) (habeas review of constitutional claim not barred when Supreme Court of Florida ruled on merits in defendant's post-conviction proceeding even though defendant failed to raise issue in direct appeal).

Respondents' final argument in support of a presumption in favor of default is equally unpersuasive. Respondents argue that "[n]o fundamental miscarriage of justice can result from this rule [presumption in favor of default] since the cause-and-prejudice standard protects against any instance of unjust incarceration." (Respondents' Brief at 14.) In other words, it does not matter if there really is an adequate and independent state ground, because the "cause and prejudice" test of *Sykes* will cure any injustice.

Respondents' argument turns *Sykes* on its head. The basic premise underlying *Sykes* is that the state court has determined that its judgment is based on adequate and independent state grounds and that that determination should be respected by a federal court in a *habeas* case. Nowhere in *Sykes* or its progeny, including the cases the Respondents cite for this argument, *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982), and *Smith* v. *Murray*, 477 U.S. 527 (1986), is there any indication that a federal court in habeas cases need not concern itself with the adequacy and independence of the state ground because the "cause and prejudice" test serves as some type of "safety net." If no adequate and independent state ground exists, then a federal court has an unflagging duty to review the merits of a habeas petitioner's claim. *See Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

As Professor Yackle has pointed out:

> In *Sykes* itself the court did not plunge ahead to determine whether the applicant in that case had

> offered a sufficient reason for a procedural default in state court. First the court appraised the adequacy of the state's procedural ground of decision and determined, independent of the "cause" and "prejudice" analysis, that the procedural ground at work in the case would have been sufficient to foreclose direct review in the Supreme Court itself. It follows that if a state ground is found inadequate, the matter ends then and there - and the door to habeas review is thrown open. For it hardly can be proposed that the court would permit a state ground of decision that would *not* foreclose direct review to have that very effect in habeas corpus.

Yackle, *Postconviction Remedies*, 384, p. 153 (1988 Cum. Supp.). *See also Breest* v. *Perrin*, 655 F.2d 1, 2, n. 1 (1st Cir. 1981), *cert. denied*, 454 U.S. 1059 (1981) (the adequacy and independence of the asserted state procedural bar must be determined before applying the *Sykes* "cause and prejudice" test). Hence, the "cause and prejudice" test is no substitute for a plain statement of an adequate and independent state ground.

II. RESPONDENTS' ATTEMPT TO DISTINGUISH *LONG* IS UNPERSUASIVE.

Respondents first attempt to distinguish *Long* on the ground that it involved state substantive law and not a state procedural default. (Respondents' Brief at 12-13.) According to Respondents, "state procedural default does not leave open any confusion over whether the state court has relied on state or federal law." (*Id.* at 12.) Inexplicably, Respondents do not mention *Caldwell* v. *Mississippi*, which specifically extended the plain statement rule to procedural defaults in direct appeal cases. Respondents also do not explain why a state procedural default necessarily precludes confusion over whether the state court relied on the default or the merits. Unless the state court

plainly states the basis of its judgment, confusion certainly can exist over whether the state court relaxed its procedural default rules and relied on the merits of the petitioner's claim.

Respondents also argue that *Long* is distinguishable because the Supreme Court of Michigan discussed federal constitutional law. Respondents argue that in Petitioner's case "there is no implication to *any* federal law or constitutional provision resulting from the state procedural rulings."[2] (*Id.* at 13, emphasis added.) This argument is startling. The implication of Petitioner's procedural default, if relied upon as a basis for the Illinois Appellate Court's judgment, is that review of his ineffective assistance of counsel claim under the United States Constitution, Sixth Amendment is barred. The Illinois Appellate Court, like the Michigan Supreme Court, clearly discussed federal constitutional law. Petitioner's Post-Conviction Petition invoked the Sixth Amendment of the United States Constitution. In addressing the merits of his Sixth Amendment claim, the Illinois Appellate Court's decision was "interwoven with federal law" within the meaning of *Long*, 463 U.S. at 1040.[3]

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[2] Presumably, Respondents mean "state procedural default" when they refer to "state procedural rulings." There never was a ruling or a finding in the Illinois courts that Petitioner's constitutional claim was barred because of his procedural default.

[3] The Illinois Appellate Court cited *People* v. *Murphy*, 72 Ill.2d 421, 381 N.E.2d 1076 (1978), which in turn relied on *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *People* v. *Pendleton*, 104 Ill.App.3d 1104, 433 N.E.2d 1076 (1st Dist. 1982), and *People* v. *Martinez*, 104 Ill.App.3d 990, 433 N.E.2d 981 (1st Dist. 1982), both of which in turn rely on *Cuylie* v. *Sullivan*, 446 U.S. 335 (1980); and *People* v. *Elder*, 73 Ill.App.3d 192, 391 N.E.2d 403 (1st Dist. 1979), which in turn relied on *United States* v. *Ragen*, 166 F.2d 976 (7th Cir. 1948) and *United States* v. *Trigg*, 392 F.2d 860 (7th Cir. 1968), *cert. denied*, 391 U.S. 961 (1968). (J.A. at 12-14.)

Finally, the independence of any possible state law ground is not clear from the face of the opinion within the meaning of *Long*, *supra* at 1040. The Illinois Appellate Court order simply is ambiguous as to whether it relies on Petitioner's procedural default as an independent ground. Respondents' statement to the contrary that "[t]his is a case where waiver has been found pursuant to state rules and where no exceptions to the waiver rules are apparent" (Respondents' Brief at 13) is untrue. This case is before the Court precisely because there has been no explicit finding of waiver by the state courts. Respondents' further assertion that no exceptions exist reflects Respondents' ostrich-like view of Illinois waiver rules.

III. THE ILLINOIS APPELLATE COURT ORDER LACKS A PLAIN STATEMENT THAT IT RESTS ON AN ADEQUATE STATE GROUND AND THEREFORE THE MERITS OF PETITIONER'S CLAIM HAVE BEEN PRESERVED FOR FEDERAL REVIEW.

Respondents state that "[w]hile there does seem to be an ambiguity on the face of the opinion on the question of to what extent the appellate court relied on the procedural default, there is no question that the appellate court found there was a procedural default." (Respondents' Brief at 14-15.) Petitioner agrees. There is no question that Petitioner failed to raise ineffective assistance of counsel as an issue in his direct appeal. There is a question, however, as to whether the Illinois Appellate Court relied on Petitioner's default or on the merits of his constitutional claim as the basis for its order. As stated in *Morishita* v. *Morris*, 702 F.2d 207, 209 (10th Cir. 1983), the federal court "must inquire, not only if there is a state procedural bar, but whether the state itself applied the bar." Noting a procedural default is a far cry from relying

on that default as a bar to Petitioner's constitutional claim.

After conceding that the Appellate Court order is ambiguous regarding whether it relied on the procedural default, Respondents assert inconsistently that the Appellate Court clearly found the claim barred. (Respondents' Brief at 15.) Petitioner, and at least two federal judges below, disagree with the proposition that the Appellate Court found the claim barred. Even the majority in the Court of Appeals below agreed that the Illinois Appellate Court did not clearly find the claim barred. The majority below based its decision on its speculation as to what the Illinois Appellate Court probably meant to do. *Harris* v. *Reed*, 823 F.2d 684, 687 (7th Cir. 1987).

Respondents do nothing more than offer their own speculation. True, the Appellate Court order does discuss in the segment quoted by Respondents, that certain alibi witnesses were not of record and therefore were not required to be raised on direct appeal. (J.A. at 12.) In the segment of the decision which the Respondents do not quote, however, the Appellate Court proceeds to discuss the ineffective assistance issue generally. In its concluding paragraph, the court states:

> Viewing defendant's petition and supporting affidavits *in light of the record*, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court [sic].

(J.A. at 14, emphasis added.) Perhaps the Appellate Court intended its discussion of the merits as *dictum*. Yet, it is equally plausible that the Appellate Court dis-

cussed the doctrine of *res judicata* briefly and then, in accordance with Illinois law, decided against relying on the doctrine because of the importance and nature of Petitioner's constitutional claim, which the court believed it should resolve. The Appellate Court's true intentions are unclear. Its order presents federal courts with the very sort of difficulty that the plain statement rule would avoid.

Petitioner Warren Harris has a strong case that he was denied effective assistance of counsel.[4] The District Court and Judge Cudahy's concurring opinion both recognized that the case presented a "very close" question. Habeas review of such a close case should only be denied if the state court relied on the procedural default in a plain statement.

[4] Recently, the Seventh Circuit upheld the granting of a writ of habeas corpus on an ineffective assistance claim where defense counsel failed to investigate and call an alibi witness. *Montgomery* v. *Petersen*, 846 F.2d 407 (7th Cir. 1988).

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded to that court for consideration of the merits of Petitioner's constitutional claim.

Respectfully submitted,

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